

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SONIA HOFMANN, an individual and on
behalf of all others similarly situated,

Plaintiff,

v.

DUTCH LLC, a California Limited
Liability Company; and DOES 1 through
100, inclusive,

Defendant.

Case No.: 3:14-cv-02418-GPC-JLB

**TENTATIVE ORDER DENYING
MOTION FOR PRELIMINARY
APPROVAL OF PROPOSED CLASS
SETTLEMENT**

[ECF No. 43]

Before the Court is Plaintiff's third motion for preliminary approval of the proposed class settlement. Dkt. No. 43-1. Because all parties have agreed to the proposed settlement, Defendant Dutch, LL ("Defendant") does not oppose this motion. Dkt. No. 45. After considering the parties' submissions and arguments, and for the reasons that follow, the Court is tentatively prepared to **DENY** Plaintiff's motion for preliminary approval.

BACKGROUND

1. First Motion for Preliminary Approval

On April 26, 2016, the Court denied Plaintiff's initial motion for preliminary approval of the class settlement. Dkt. No. 37. The initial proposed settlement provided

1 for: (1) \$20 worth of e-gift certificates for each of the class members; (2) \$250,000 in *cy*
 2 *pres* awards; and (3) up to \$175,000 in plaintiff's attorney's fees with a clear sailing
 3 provision attached.¹

4 The Court identified three problems with the proposed settlement, namely: (1) that
 5 the e-gift certificates effectively constituted coupons because they required class
 6 members to pay out of their own pocket before they could redeem them, since while the
 7 face value of the e-gift certificates was \$20, the average price of Defendant's jeans was –
 8 and still is – around \$200, and no item was being sold by Defendant for less than \$58.80;
 9 (2) that the *cy pres* award failed to meet the objective of the underlying statute of
 10 consumer protection, since the proposed charities did not promote consumer protection,
 11 but rather focused on “helping and meeting the needs of women in our society”; and (3)
 12 that, when considered in conjunction with the other provisions of the proposed
 13 settlement, the clear sailing provision “created at least a danger of collusion during the
 14 settlement negotiations which is not refuted by the record.” *Id.* at 9-15. The Court
 15 permitted the parties an additional sixty days to file a renewed motion for preliminary
 16 approval of class action settlement that cured the deficiencies identified by the Court. *Id.*
 17 at 15.

18 **2. Second Motion for Preliminary Approval**

19 On August 16, 2016, the Court denied Plaintiff's second motion for preliminary
 20 approval of the class settlement (Dkt. No. 38). Dkt. No. 41. For the renewed attempt to
 21 propose a settlement, Plaintiff proposed the following: (1) one denim tote bag (\$128 retail
 22 value) and \$20 e-gift certificates for the class members; (2) \$250,000 in *cy pres* awards,
 23 to the same charities as proposed in the initial settlement; and (3) up to \$175,000.00 in
 24 Plaintiff's attorney's fees with the same clear sailing provision attached. *See* Dkt. No. 38,
 25 Ex. 1. In other words, the only difference between the first and second proposed
 26

27
 28 ¹ The “clear sailing” provision refers to the agreement between Plaintiff's counsel and Defendants that
 the Plaintiff's attorney fee award will not exceed a fixed amount. *See* Dkt. No. 43-1 at 16.

1 settlement was the addition of the denim tote bag. The Court denied the parties' renewed
2 motion for preliminary approval because it did not cure the deficiencies that the Court has
3 previously identified. Dkt. No. 41 at 2. In particular, the Court emphasized that the
4 second motion did nothing to address the Court's concern that the proposed *cy pres*
5 award did not conform to Ninth Circuit legal authority, which requires a sufficient nexus
6 between the charitable purpose of a charity and the objectives underlying the violated
7 statute. *Id.*

8 **3. Third Motion for Preliminary Approval**

9 Plaintiff filed the instant motion for preliminary approval on October 14, 2016.
10 Dkt. No. 43. Here, the proposed settlement consists of (1) a current-Elliot brand tote bag
11 (retail value of \$128.00) and electronic gift card codes "redeemable on
12 www.CurrentElliott.com only and loaded with values of multiples of \$20.00
13 corresponding to the number of units of Class Products purchased during the Class
14 Period"; (2) \$250,000 in *cy pres* awards to be made over five years; (3) and up to
15 \$175,000 in attorney's fees, with the same clear sailing provision. *Id.* at 11-13.

16 There are two key differences between this proposed settlement and the previous
17 proposal — the first concerns the award for the class and the second concerns the *cy pres*
18 award. First, under the new settlement, members of the class will receive at least \$20 in
19 electronic gift card codes, and possibly more depending on the number of units purchased
20 by the class member. Second, here, Plaintiff has modified the proposed *cy pres* award to
21 account for Defendant's intent to donate \$200,000 over four years to a scholarship
22 endowment at the consumer science department of a not-for-profit institution of higher
23 education. *Id.* at 12. Although Plaintiffs do not go into any detail regarding the nexus
24 between the scholarship endowment and Defendant's violations of the consumer
25 protection laws, they have provided the court with the URL for the homepage of
26 California State University, Northridge's ("CSUN") consumer science department. *Id.*
27 The mission of CSUN consumer science program is to "enhance and promote consumer
28 wellbeing and empowerment through research, education, and outreach." *See* Consumer

1 Affairs, <http://www.csun.edu/health-human-development/family-consumer->
2 sciences/consumer-affairs (last visited December 16, 2016). Ultimately, Plaintiffs intend
3 for Defendants to donate \$200,000 to a scholarship endowment at a department like the
4 one at CSUN. Dkt. No. 43 at 12-13.

5 Plaintiff's current proposed *cy pres* award is different in kind than the previous one
6 proposed. For the second proposed settlement, Plaintiff stated that the Defendant
7 intended to make \$200,000 in donations to "Step Up Women's Network, FIDM
8 Scholarship, Race for the Cure, Juvenile Diabetes Research Foundation and Ability
9 First." Dkt. No. 38-1 at 9. None of those organizations had any obvious connection to a
10 consumer rights violation and Plaintiff offered no such connection. *See id.* That being
11 said, Plaintiffs' third proposed *cy pres* award is, nonetheless, similar to its predecessor in
12 that it continues to include a \$50,000 donation already made, and not approved by the
13 Court, to Step Up Women's Network. *Id.*

14 Other similarities between this third proposed settlement and those that came
15 before it give the Court further pause.

16 For one, the proposed class award still requires class members to purchase items
17 from Current Elliot in order to reap any monetary benefit. And as the Court has
18 previously noted, because the cost of Defendant's jeans hovers around \$200.00, class
19 members would have to spend much more than they would gain by receiving \$20, \$40, or
20 even \$60 gift cards. That the class members will also receive a free tote bag does not
21 obviate this fact. Although the tote bag boasts a retail value of \$128, it is unlikely that
22 the bag is worth that much, if anything at all, to the class recipients.

23 Two, the proposed class settlement does not remove the clear sailing provision in
24 Plaintiff's request for attorney's fees. The continued presence of that provision fortifies
25 the Court's concern that the attorneys have not proposed a settlement with the best
26 interests of the class in mind and invites the Court to continue to apply an exacting
27 standard in analyzing the reasonableness of the settlement terms.

28 As such, the Court is prepared to **DENY** Plaintiff's Third Motion for Preliminary

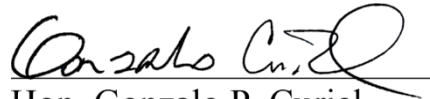
1 Approval of Class Settlement.

2 **CONCLUSION**

3 Counsel are advised that the Court's rulings are tentative, and the Court will
4 entertain additional argument at the hearing on January 11, 2016. The parties shall
5 have a combined total of one hour to present their arguments. The time shall be
6 divided equally between each side, and counsel shall be responsible for keeping time
7 and reserving time as necessary for response, rebuttal, or both.

8 **IT IS SO ORDERED.**

9
10 Dated: January 10, 2017

11 
12 Hon. Gonzalo P. Curiel
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28